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In The
Supreme Court Of The United States

October Term, 1997

RICHARD BLUMENTHAL,
ATTORNEY GENERAL OF CONNECTICUT,
Petitioner

v.

PHILIP MORRIS, INC., ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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The Petitioner, Richard Blumenthal, Attorney General for the State of Connecticut, submits this reply brief in support of his petition for a writ of certiorari.

As the Amici accurately point out, "[t]his Court has never held that where a State brought a judicial proceeding, the state interest was of insufficient magnitude to justify *Younger* abstention." (Amicus Brief at 5) The tobacco companies claim, however, to have identified cases for the first time that *are* of such insignificant magnitude -- the landmark actions of 44 states and other jurisdictions seeking broad remedial relief to enjoin and correct the companies' deceptive unfair and anti-competitive practices, as well as to recoup billions of dollars in damages caused by the tobacco companies and their products.

The tobacco companies' misunderstanding of proper *Younger* analysis, parroting the Court of Appeals' similar misunderstanding, demonstrates perfectly why this Court should exercise jurisdiction to review the Court of Appeals' decision. The Court of Appeals' conclusion that no important state interest is implicated in this case so far departs from this Court's precedents, as well as from any logical application of *Younger* principles, that this Court's review is warranted. Further, the tobacco companies' view that they can avoid *Younger* principles by bringing a federal challenge to a portion, or "one aspect," of Connecticut's state court action, is without precedent and defies both the concepts underpinning the *Younger* doctrine and the realities of such dual track litigation.[1/]

[1/] The tobacco companies continue to recite as their mantra the proposition that abstention is reserved for "exceptional circumstances." (Opposition at 18) The Petitioner does not dispute this as a general matter. The specific rule applicable to *Younger*, however, is that a federal plaintiff's attempt to enjoin an ongoing state proceeding that involves an important state interest is itself an "extraordinary circumstance" that "justif[ies] abdication of the virtually unflagging obligation . . . to exercise the jurisdiction

I. EVEN IF CONNECTICUT'S STATE COURT ACTION ONLY SOUGHT MONEY DAMAGES, IT WOULD STILL IMPLICATE AN IMPORTANT STATE INTEREST.

The tobacco companies claim, and the Court of Appeals concluded, that if a sovereign state plaintiff seeks money damages in state court and the federal plaintiff only seeks to interfere with the attempt to collect such money damages, no important state interest is implicated. Putting aside whether the "important State interest" test may be applied selectively to just "one aspect" of the ongoing state proceeding,[2/] *see* pp. 6-8, *supra,* this position is completely

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given the federal courts." *Deakins v. Monaghan*, 484 U.S. 193, 204 (1988). Indeed, abstention is "the normal thing to do" when federal courts are asked to enjoin such state court proceedings. *NOPSI v. Council of New Orleans*, 491 U.S. 350, 359 (1989); *Younger v. Harris*, 401 U.S. 37, 45 (1971). In fact, "[w]here a case is properly within [the *Younger*] category of cases, there is no discretion to grant injunctive relief." *Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 816 n.22 (1976).

2/ The tobacco companies believe, as the Court of Appeals did, that it is their perogative to determine and label the "principal" and "primary" aim of the State's lawsuit. In their zeal to do so, and in furtherance of their deceptive course of conduct, they quote selectively and misleadingly from the Petitioner's press releases and omit plain references to the non-monetary relief replete in the State's Complaint. (Opposition at 6) For example, the Attorney General did not say that "his 'primary purpose' in bringing the suit was to seek to obtain a massive monetary recovery," as the tobacco companies represent to this Court. (*Id.*) Rather, he said that "[*a*] primary purpose of the suit is recovery of Medicaid funds . . . ." (JA A-257)(emphasis supplied) Further, they fail even to quote the beginning of the Attorney General's July 18, 1996 press release, which reads:

> Attorney General Richard Blumenthal today filed a $1 billion lawsuit against the tobacco industry -- the largest civil lawsuit ever brought by the State of Connecticut -- to recover Medicaid money spent on tobacco-related illnesses and to halt the aggressive

untenable. Under their theory, whenever a state seeks monetary recovery as one form of relief in state court, the state court defendant can challenge that monetary relief preemptively in federal court, thereby significantly increasing federal caseloads and duplicating proceedings that can properly be adjudicated in state courts. The Petitioner and the amici from 50 separate jurisdictions, backed by this Court's precedents and the principles of comity, federalism, equity and judicial economy that underlie the *Younger* doctrine, fundamentally disagree.

In both *Pennzoil Co. v. Texaco*, 481 U.S. 1, 11 (1987), and *Trainor v. Hernandez*, 431 U.S. 434 (1977), this Court rebuffed federal plaintiffs' attempts to interfere with the imposition of monetary liability against them in the State court. These cases represent examples of "important state interests" in "ongoing state proceedings" that justify and support the application of *Younger* abstention. The best the tobacco companies can do is to explain that the state interests in those cases differ somewhat from this case. In doing so they fail utterly to demonstrate how the state interests at stake in Connecticut's lawsuit are in any respect less important than the interests involved in *Pennzoil* and *Trainor*.

Trainor concerned a state's attempt to safeguard the fiscal integrity of its public assistance programs against an individual who had fraudulently concealed assets when applying for and receiving thousands of dollars in welfare

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> marketing of tobacco products to children and teenagers. (JA A-255) (emphasis supplied).

Finally, they decide to omit the sentence that reads:

> The State is also seeking to put an end to the tobacco industry's 40-year conspiracy of deception, suppression and misrepresentation, and to protect children from the dangers of tobacco by ending the industry's practice of targeting its advertising and promotions towards minors. (JA A-256).

benefits. *Trainor*, 431 U.S. at 444. Connecticut's state law claims for money damages implicate state interests at least as important: its attempt to safeguard the fiscal integrity of its Medicaid and other welfare programs against ten tobacco giants who have by their wrongful, deceptive, and anticompetitive conduct inflicted billions of dollars in damage upon Connecticut's economy and the public fisc.[3/]

[3/] The Court of Appeals improperly downplayed the significance of money damages available under the Connecticut Unfair Trade Practices Act ("CUTPA"), as do the tobacco companies (Opposition at 15-16), citing the fact that under Connecticut law private citizens can also bring such an action. *Philip Morris, Inc. v. Blumenthal*, 123 F.3d 103, 106-07 (2d Cir. 1997) To the contrary, the Connecticut Legislature found the public policies underpinning CUTPA so compelling it decided to supplement the state's sovereign enforcement powers by permitting private attorney general actions to vindicate these interests. *Gill v. Petrazzuoli Bros., Inc.*, 10 Conn. App. 22, 33 (1987). In fact, in the past five calendar years, the Connecticut Attorney General's Office has logged the commencement of 578, 511, 373, 410 and 467 CUTPA actions. Under the Court of Appeals' opinion, these cases would all be liable to preemptive federal actions. Moreover, a sovereign enforcement action under CUTPA permits the state monetary remedies such as civil penalties that are not available in a private attorney general CUTPA action.

The tobacco companies also place undue reliance upon the Connecticut General Assembly's collective decision not to pass legislation relating to a suit such as this. First, the General Assembly did not "den[y] authorization," as the companies contend. (Opposition at 2) The bills referred to were never reported out of committee and never voted upon, up or down. Second, the bills would only have affected, if at all, the State's claims for Medicaid reimbursement: it would not have affected statutory claims for Anti-trust or unfair trade practices. "Inquiry into legislative motive is often an unsatisfactory venture. . . . What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Pacific Gas & Energy Resources Comm'n*, 461 U.S. 190, 216 (1983). This inquiry is even less satisfactory when seeking to determine why legislators *failed* to enact a measure. The General Assembly may have declined to pass the bill because it determined, as the

II. THE TOBACCO COMPANIES' THEORY THAT THEY MAY CHALLENGE "ONE ASPECT" OF THE STATE'S SUIT AND AVOID *YOUNGER* ABSTENTION LACKS ANY PRECEDENT.

> The tobacco companies assert:
>
> [W]hat the Second Circuit did was to analyze the scope of the *Companies' Federal Complaint*, and to determine whether *the aspects of the State lawsuit with which the Federal Complaint would interfere* -- namely, the State's attempt to obtain a monetary recovery in favor of itself of medical expenses paid -- implicated an important interest for *Younger* purposes. (Opposition at 9) (emphasis supplied)

This defense of the Second Circuit's decision proceeds from a fundamentally misguided and doctrinally flawed premise: that the federal plaintiffs may avoid *Younger* abstention by challenging only one "aspect"[4/] of the State's action (in this

> Attorney General contended, that enactment of the bill was unnecessary for the State to obtain the relief sought in the complaint.

[4/] To serve their present purposes the tobacco companies modestly claim that their federal action seeks only to interfere with "one aspect" of the pending state court action. In point of fact, their claimed relief could not be more sweeping. Their complaint asks the federal court to enjoin the State "from *bringing*, *prosecuting*, *imposing* or *enforcing* liability pursuant to the Threatened Lawsuit." (Respondents' Appendix RA-27) Compelling evidence that this new found modesty is in fact entirely disingenuous is the tobacco companies' First Amendment claim (Seventh Claim). In its state court action, the State prays for an order that each defendant fund a "corrective public education campaign to remedy the unfair and deceptive acts and practices complained of." (Appendix to Petition A-127) Anticipating this claim for relief, the tobacco companies alleged in their federal action that such an order would compel them "to pay for speech with which they

case a particular claim for relief) that they claim does not implicate an important state interest, although admittedly other aspects of the State's action do implicate important state interests.[5/]

First, none of this Court's precedents support the tobacco companies' proposed dissection theory, and they have cited none. In fact, such a theory would be directly contrary to *NOPSI v. Council of New Orleans*, 491 U.S. 350, 375 (1989), which instructs courts to look to "the importance of the *generic proceedings* to the State." Examining "one aspect" of those proceedings would constitute a "specific," rather than "generic," analysis. Further, it would improperly focus on "outcomes," which *NOPSI* discountenanced. *Id.* Thus, the tobacco companies' statement that the "defendants [sic] offered ample evidence" "showing that the aspect of the State's suit with which the Companies' Federal Complaint seeks to interfere . . . does not implicate important State interests" (Opposition at 20) is irrelevant because that is not the inquiry.[6/]

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disagree" in violation of the First Amendment, and ask for a federal injunction on that ground. (Respondents' Appendix RA-24 to RA-25) Such an interference with the state court action has nothing at all to do with money damages for health care costs, contrary to the tobacco companies' current characterization of their suit.

5/ The Petitioner, of course, contends that even that "one aspect" of the suit vindicates an important state interest.

6/ Consistent with their attempt to turn the *Younger* doctrine on its head, the tobacco companies claim that the Court of Appeals' statement that "we do not find that the *federal* action implicates an important state interest within the meaning of *Younger*" (emphasis supplied) was not an error. If it was not, the Court of Appeals clearly applied the wrong test.

In *Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 432 (1982), the Court stated: "The question in this case is three-fold: first, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme

Further, in many cases, including this one, it is impossible to dissect surgically one "aspect" of the case and litigate it in a federal forum without interfering with the State suit or duplicating legal proceedings. The State's monetary claims are necessarily intertwined with, both begally and factually, its claims for injunctive relief. For example, all of the state court claims for relief flow from various legal claims of liability (e.g., Commerce Clause, Due Process). The tobacco companies claim to have numerous federal defenses to each that would prevent the imposition of such liability. To adjudicate those defenses, even if purporting to address only the money damages portion of the state suit, a federal court would necessarily have to resolve state and federal law questions that the state court would simultaneously address. The several policies underlying the *Younger* doctrine (federalism, comity, judicial economy and eschewing unnecessary determinations of state and federal law) all counsel a federal abstention in such an instance. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10-11 (1987).

III. THE POSSIBILITY OF *PULLMAN* ABSTENTION DOES NOT OBVIATE THE NEED FOR THIS COURT'S REVIEW.

The State has never asked the District Court to abstain under *Railroad Commission v. Pullman Co.*, 312 U.S.

Court constitute *an ongoing state judicial proceeding*; second, do *the proceedings* implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges." Clearly (and obviously) under *Younger* the focus is properly on whether the *state court* proceedings implicate an important state interest, not whether the federal proceedings implicate an important state interest. *See also Hawaii v. Midkiff*, 467 U.S. 229, 237-38 (1984) ("Under *Younger*-abstention doctrine, interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests.").

496 (1941). On the other hand, the tobacco companies have beseeched the federal courts at every level to abstain under the *Pullman* doctrine. They now urge this Court to decline review of this case because the District Court has yet to rule on whether *Pullman* abstention is appropriate. This persistent invocation of *Pullman* abstention reveals the true motivation for this suit.

Clearly the tobacco companies seek to delay a final adjudication of the State's claims against them by keeping alive, if in abeyance, a subsequent federal court adjudication of various defenses until after completion of the state court proceedings. Plainly they hope to add years to the litigation of this case since, for every month they can protract the litigation, they garner hundreds of millions of dollars in ill-gained profits. Further, they seek to consume the State's resources by forcing battles on two fronts and maintaining in place a "federal check" to the state court's activities other than this Court's ultimate power of review.

This is an inappropriate use of the *Pullman* doctrine and counsels in favor of this Court's review of the Second Circuit's decision. The considerations that underlie *Pullman* (i.e., unsettled state law questions that potentially render the federal constitutional questions advisory) also play a part in *Younger* abstention. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987).[7/] Under a *Younger* analysis, these considerations are buttressed by comity considerations, by which an "inferior" federal court recognizes the equal dignity that state courts have in enforcing federal constitutional law.

7/ "The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. [illegible] ...9 (1987). Of course, the Petitioner would also have no [illegible]anteed avenue for returning to this Court should the District [illegible]urt abstain, or fail to abstain, under *Pullman*.

Finally, declining review of the decision below because of the possibility of *Pullman* abstention would leave in place an erroneous Court of Appeals precedent with the potential to inflict great harm upon state sovereign interests, including interests transcending the context of the several states' actions against the tobacco companies. (*See* Petition at 15) For these reasons it is important for this Court to review this issue now rather than await the results of other of the tobacco companies' abusive and preemptive lawsuits.

Respectfully submitted,

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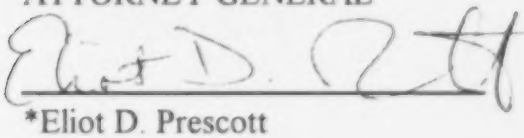

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